98-991

No. [redacted]

In The

Supreme Court of the United States

October Term, 1998

J. CHRISTOPHER TARANTINO,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit correctly determine that Petitioner's requested amended complaint could not give rise to municipal liability?

2. Did the United States Court of Appeals for the Fifth Circuit correctly determine that the district court did not abuse its discretion in not allowing Petitioner to amend his complaint?

3. Did the United States Court of Appeals for the Fifth Circuit correctly determine that the district court did not abuse its discretion in not allowing Petitioner to continue the summary judgment motion to conduct additional discovery?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Dallas files this Respondent's Brief in Opposition ("Response") to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), asking the Court to deny the Petition to review the opinion issued June 15, 1998, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondent respectfully shows the Court as follows:

STATEMENT OF JURISDICTION

The correct statutory basis for jurisdiction of this Court is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

In addition to the provisions cited by Petitioner, the following are also involved in the case:

1) U.S. Const., amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2) U.S. Const., amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3) U.S. Const., amend. XIV (Section 1)

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4) Tex. Civ. Prac. & Rem. Code § 101.021

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or

> real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Petitioner's statement regarding the course of proceedings and disposition in the trial court is essentially correct. For the sake of accuracy and completeness, however, Respondent provides the following statement of the course of proceedings in this case.

Petitioner filed this lawsuit in the district court of Dallas County, Texas, on January 29, 1997, as a result of a confrontation with City of Dallas firefighter Darr D. Pierce on May 5, 1995. Rec. Vol. I, p. 8. Although not specifically stated, Petitioner brought this suit pursuant to 42 U.S.C. § 1983 and Tex. Civ. Prac. & Rem. Code §§ 101.001, *et seq.* ("Texas Tort Claims Act"). *Id.* Petitioner specifically alleges that Defendant Darr D. Pierce (hereafter "Pierce") violated Petitioner's Fourth, Eighth and Fourteenth Amendment rights as secured by the United States Constitution, and further alleges negligence/gross negligence and assault and battery against Pierce. Rec. Vol. I, p. 9. Petitioner's specific allegation against Respondent is that Respondent is vicariously liable for the negligence of Pierce. Rec. Vol. I, p. 10.

Respondent and Pierce were served with process and timely answered in this cause on February 24, 1997, and February 20, 1997, respectively. Rec. Vol. I, pp. 12-21. Respondent and Pierce timely removed this action to

federal court on February 28, 1997, because Petitioner's complaint asserted matters in dispute over which the United States District Court had original jurisdiction under 42 U.S.C. § 1983. Rec. Vol. I, pp. 1-21. Petitioner did not seek remand of this case.

On June 4, 1997, Respondent filed a motion for summary judgment on the basis that Petitioner did not state a claim against Respondent for which relief could be granted pursuant to 42 U.S.C. § 1983 or the Texas Tort Claims Act, and that Petitioner, therefore, could not raise a material factual dispute with respect to any issue in the case. Rec. Vol. I, pp. 42-95. On June 20, 1997, Petitioner filed a motion requesting an extension of time in which to respond to Respondent's motion for summary judgment and a separate motion requesting leave to file an amended complaint. Rec. Vol. I, pp. 96-112. On June 24, 1997, Petitioner filed his response to Respondent's motion for summary judgment. Rec. Vol. I, pp. 113-118. On July 9, 1997, Respondent filed its response to Petitioner's motion for leave to amend his pleadings and its reply to Petitioner's summary judgment response. Rec. Vol. I, pp. 119-136. On July 10, 1997, Respondent filed its response to Petitioner's motion requesting an extension of time in which to respond to Respondent's motion for summary judgment. Rec. Vol. I, pp. 137-146. After considering the motions, the responses, the evidence and the pleadings, the district court issued an order on August 15, 1997, denying Petitioner's motions to amend his pleadings and for an extension of time in which to respond to Respondent's motion for summary judgment. Rec. Vol. I, pp. 153-161. The district court also granted Respondent's

motion for summary judgment on that date, and dismissed all Petitioner's claims against Respondent. *Id.* The district court's final judgment was entered on August 18, 1997. Rec. Vol. I, p. 162.

Petitioner thereafter perfected his appeal to the Fifth Circuit on September 11, 1997. Rec. Vol. I, p. 163. The district court's judgment was affirmed on June 15, 1998, and rehearing was denied on July 17, 1998.

It should be noted that Petitioner does not challenge in this Court the Fifth Circuit's decision affirming the district court's grant of summary judgment based on Petitioner's live complaint.

B. Statement of Facts

Although Respondent does not agree with many of Petitioner's factual allegations, the evidence must be construed, for purposes of the motion for summary judgment, in the light most favorable to Petitioner. The district court, as it noted in its opinion, properly considered any disputed facts in favor of Petitioner. Appendix to Petition, p. A-13. However, Respondent's statement of facts, to the extent it is not disputed by Petitioner, must be taken as true.

On May 5, 1995, the Dallas Fire Department was overwhelmed with requests for assistance due to violent flooding throughout the City of Dallas. Rec. Vol. I, pp. 58-93. That night, Pierce and his fellow firefighters attempted an extremely difficult and dangerous high water rescue involving an elderly couple stranded in rushing flood waters. *Id.* During the rescue attempt, the

female victim lost her life and two fellow firefighters narrowly escaped losing their lives. *Id.* Pierce and the members of his crew felt utterly frustrated at having been unable to save the woman's life. *Id.*

Just as Pierce and his crew were returning to Firestation 17, located at 6000 Belmont, in Dallas, Texas, from the rescue attempt, Petitioner walked up to the firestation alone and came upon Pierce. Rec. Vol. I, pp. 58-60, 72. Petitioner demanded flares from Pierce and reported disabled traffic lights and stalled cars in a nearby intersection. *Id.* Pierce told Petitioner that they knew about the disabled lights and stalled cars and explained that the electricity was out all over the City and the people were safely out of the stalled vehicles. *Id.* Pierce further informed Petitioner that the flares would not stay lit in the rain, and could not be placed in the streets because of the high water. *Id.* Pierce asked Petitioner to go home, explaining that he and the other members of the crew were doing the best they could under the circumstances. *Id.* A verbal dispute ensued between Petitioner and Pierce, which resulted in Pierce grabbing Petitioner by the shirt and pulling him to the ground. *Id.* Pierce could smell alcohol on Petitioner and told him, "I don't have time for drunks, partner, we just lost a woman. Now go home." Pierce then assisted Petitioner to his feet, and the two men parted ways. *Id.*

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

A. The Standards for Review Have Not Been Met by Petitioner

Petitioner requests this Court to review the Fifth Circuit's opinion affirming the district court's denial of his motion to amend his complaint and his motion to continue the summary judgment motion to allow additional discovery. Petition, p. i. Although not specifically stated, Petitioner asserts that the Court's discretionary review powers are appropriately engaged because the Fifth Circuit's opinion in this case either ignored or conflicts with this Court's decisions, ignored other Fifth Circuit opinions, and is in conflict with other circuit courts' decisions. *See* Petition. Petitioner's contentions are without merit, and the Court should deny discretionary review in this matter pursuant to Supreme Court Rule 10.1, which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Court has held that the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioner's failure to satisfy this standard should necessarily result in the Court's denial of his Petition.

B. The United States Court of Appeals for the Fifth Circuit Correctly Determined That Petitioner's Request Amended Complaint Could Not Give Rise to Municipal Liability

Petitioner alleges that the Fifth Circuit incorrectly held that his proposed amendment would be futile and that a "heightened pleading standard" is required to allege municipal liability. Petition, pp. 3-4. Specifically, Petitioner argues that his proposed amendment was sufficient to meet the *Leatherman* standard for complaints

alleging municipal liability. *Id. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993). Petitioner's reading of the Fifth Circuit's opinion, however, is incorrect. The Fifth Circuit approached its analysis of the district court's holding in light of an abuse of discretion standard with respect to the law relevant to Rule 15(c) for amending complaints. Petitioner argues that the Fifth Circuit did not follow *Leatherman* in affirming the district court's decision to deny his motion to amend his complaint. *Leatherman,* however, is a case which considers the adequacy of a complaint alleging municipal liability in the face of a motion to dismiss. In this case, the lower courts considered the futility of a proposed amendment in the face of a pending motion for summary judgment. The lower courts correctly followed the legal precedent dealing with motions to amend pursuant to Rule 15(c).

Nonetheless, Petitioner argues that Respondent had fair notice of his proposed amendments, that his proposed amendments were not futile and that his proposed amendments clearly allege municipal liability. Petition, p. 4. Petitioner's arguments are conclusory at best and Petitioner does not specifically address how his proposed amendment meets the criteria relevant to motions to amend as outlined in the Fifth Circuit's opinion. Most notably, Petitioner does not address how the district court's reasoning, which was based on established legal precedent, amounted to an abuse of discretion. The Fifth Circuit's opinion, on the other hand, is clear, concise and factually specific.

The district court correctly noted that the standard required to establish municipal liability on the basis of a

failure to train claim is deliberate indifference. Appendix to Petition, p. A-17. Petitioner's proposed amendment did not allege any facts which would enable him to raise a fact issue as to Respondent's alleged deliberate indifference. Likewise, Petitioner failed to show how any discovery he might obtain would enable him to raise a fact issue as to his proposed amendment. Petitioner's alleged assertions fall far short of deliberate indifference on the part of City of Dallas policymakers, or of alleging any other basis for municipal liability. Thus, to say that the district court abused its discretion by finding that Petitioner's amendment was futile is without merit.

C. The Fifth Circuit Correctly Determined That the District Court Did Not Abuse Its Discretion in Denying Petitioner's Motion for Leave to Amend His Pleadings

1. Leave to Amend Pleadings: The Appropriate Legal Standard

Petitioner complains that the Fifth Circuit improperly found that the district court did not abuse its discretion in denying his motion for leave to amend his pleadings. Petition, pp. 3-7. The district court's ruling denying Petitioner the opportunity to amend his pleadings is reviewed by an abuse of discretion standard. *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1150 (5th Cir. 1990); *Halbert v. City of Sherman*, 33 F.3d 526, 529 (5th Cir. 1994); *Moody v. FMC Corp.*, 995 F.2d 63, 65 (5th Cir. 1993). Fed. R. Civ. P. 15 provides that leave or permission to amend a pleading "shall be freely given when justice so requires." The trial court, however, has broad discretion

in determining whether to grant a party leave to amend his pleading. *See Halbert,* 33 F.3d at 529; and *Moody,* 995 F.2d at 65. In making this decision the court may consider (1) undue prejudice to the opposing party, (2) whether the movant unduly delayed the request, (3) whether it was offered in good faith, and (4) futility of the amendment. *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Moody,* 995 F.2d at 66; *Wedgeworth v. Fibreboard Corporation, et al.,* 706 F.2d 541, 546 (5th Cir. 1983). The factors listed above merely guide the court's determination. Given the circumstances of this case, the Fifth Circuit was correct in its holding that the district court did not abuse its discretion when it denied Petitioner the opportunity to amend his pleadings.

2. Undue Prejudice to Respondent

In support of Petitioner's contention, he argues that Respondent would not have been unduly prejudiced by his proposed amendment because Respondent "anticipated" the § 1983 claim against it by virtue of Respondent's own pleadings. Petition, p. 6. Petitioner, however, has no evidence to support his contention that Respondent "anticipated" his intention to amend his complaint. Petitioner, rather, contends that Respondent's action in affirmatively pleading in its answer that there was no official policy or practice which caused Petitioner's alleged injuries is proof that Respondent anticipated Petitioner's proposed amendment. Petition, p. 6. To deduce that Respondent actually anticipated Petitioner's intention to amend his complaint is speculative, at best. Petitioner further contends that Respondent's motion for summary judgment, which argued to the district court

that Petitioner had not stated a cause of action for federal municipal liability based on an "official policy," demonstrates that Respondent anticipated an amendment by Petitioner. This argument is likewise without merit since it again assumes that Respondent could foresee Petitioner's intention to amend his complaint merely because Respondent asserted its own argument and defenses based on established legal precedent. There is no evidence in the record that indicates that Petitioner gave notice to Respondent, through the form of pleadings or otherwise, that the nature of his claims against Respondent included a claim for unlawful policy, practice or custom. As such, the district court's decision that the amendment, requested after Respondent filed its motion for summary judgment, would have unduly prejudiced Respondent does not constitute an abuse of discretion.

Essentially, Petitioner's argument is that Respondent should have guessed that he intended to amend his complaint, and should, therefore, simply have waited for Petitioner to catch and correct his mistake before attempting to dispose of the case. Given Petitioner's failure to attempt to amend his complaint until after Respondent filed its motion for summary judgment, and the complete lack of explanation for such delay, Petitioner has failed to make a showing that the district court abused its discretion in finding that Respondent would be prejudiced by the amendment and that there were not adequate grounds to allow the amendment. The Petition, therefore, should be denied.

3. Petitioner Was Not Unduly Prejudiced

Petitioner's next contention, that he was unduly prejudiced by the district court's ruling, is likewise without merit. There is no requirement by either the federal rules or Fifth Circuit jurisprudence that a court consider a plaintiff's prejudice when determining a plaintiff's own motion to amend his pleadings. Petitioner claims to have been prejudiced by the timing of Respondent's motion for summary judgment because Respondent waited until after the statute of limitations had run before filing its motion. Petition, p. 5.[1] In effect, Petitioner implies that the district court should have recognized that the timing of Respondent's motion for summary judgment was prejudicial to Petitioner (since he was not yet "aware" of his own failure to state a claim) and allowed the amendment. Furthermore, Petitioner implies that his failure should have been excused, and that Respondent should not have been allowed to file its motion for summary judgment after the running of the statute of limitations without first allowing Petitioner the opportunity to amend his complaint. Petitioner's argument fails to show how the district court abused its discretion with respect to the denial of his requested amendment.

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[1] By contrast, Petitioner also implies that Respondent filed its motion for summary judgment too early because Petitioner had not had sufficient time for discovery. Petition, pp. 7-8.

D. The United States Court of appeals for the Fifth Circuit Correctly Determined That the District Court Did Not Abuse Its Discretion in Not Allowing Petitioner to Continue the Summary Judgment Motion to Conduct Additional Discovery.

Petitioner argues that the Fifth Circuit ignored other circuit courts' decisions in denying his request to postpone a ruling on Respondent's motion for summary judgment pending further discovery. In an attempt to establish that the Fifth Circuit's opinion conflicts with decisions of other circuit courts in this regard, Petitioner compares the Fifth Circuit's opinion to an opinion from the Eleventh Circuit and an opinion from the Tenth Circuit. Specifically, Petitioner argues that the Fifth Circuit's decision conflicts with other circuit court's decisions because it requires Petitioner "to prove its case on the merits to allow a continuance of the summary judgment." Petition, p. 7. Petitioner's interpretation of the Fifth Circuit's opinion, however, is incorrect and Petitioner does not otherwise make an attempt to specifically compare the decisions which he contends are conflicting. Petitioner simply alleges in conclusory fashion that the Fifth Circuit opinion conflicts with other circuit courts' decisions.

The Fifth Circuit, rather than holding that Petitioner was required to "prove" his case "on the merits," held that:

> Fed. R. Civ. P. 56(f) provides that the court may continue a summary judgment motion to allow additional discovery, "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated

> present affidavit facts essential to justify the party's opposition." Rule 56(f) is only applicable to situations where a party shows that the additional discovery will aid it in presenting a viable opposition to the summary judgment motion (citation omitted). A party seeking continuance of a motion for summary judgment in order to obtain further discovery must show "why he needs additional discovery and how the additional discovery will create a genuine issue of material fact. The nonmoving party 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.' " (citations omitted)

Appendix to Petition, p. A-9. In applying this well settled precedent, the Fifth Circuit correctly looked to the substantive law of municipal liability to make its determination regarding Petitioner's request to postpone a ruling on Respondent's motion for summary judgment pending additional discovery. In so doing, the Fifth Circuit held that Petitioner "did not show that he even understood the burden he faced in making a showing of municipality liability under § 1983, much less that he was capable of making such a showing with further discovery." *Id.* at A-10. The Fifth Circuit's opinion further held that Petitioner's affidavit in support of his Rule 56(f) motion for continuance did not make a showing that he could create a genuine issue of material fact with regard to the deliberate indifference standard required in failure to train cases against a municipality or that Petitioner "understood, intended to prove, or was capable of proving that respondent's practice of discouraging firemen from getting appropriate psychological help was so common and

well settled as to constitute a custom that fairly represents municipal policy, or that actual or constructive knowledge of such custom is attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority." *Id.* at A-11. The Fifth Circuit's opinion, therefore, did not hold that Petitioner must "prove his case on the merits," but only that Petitioner make some showing that he could establish a material factual dispute with respect to the applicable law.

In both of the cases Petitioner cites as conflicting, this legal concept is particularly clear. In *Wallace v. Brownwell Pontiac-GMC Co., Inc.*, 703 F.2d 525, 527 (11th Cir. 1983), the Eleventh Circuit held that the nonmovant must explain why facts precluding summary judgment cannot be presented. The *Wallace* court stated that the nonmovant must specifically demonstrate how the requested discovery will show the existence of a material factual dispute. *Id.* In the second case, *Committee for the First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992), the Tenth Circuit also stated that the nonmovant must explain why facts precluding summary judgment cannot be presented, and that the explanation must identify the probable facts not available as well as what steps the nonmovant has taken to obtain those facts. Neither of these cases conflicts with the Fifth Circuit's decision.

Petitioner's reference to cases inapposite to the issues presented herein do not warrant the Court's discretionary review in this case. All of the cases cited by Petitioner apply this Court's well-established precedents regarding Rule 56(f). Petitioner's grounds for seeking certiorari are rooted not upon any actual conflict among the circuit

courts of appeal regarding this Court's precedent, but instead upon Petitioner's incorrect reading of the lower courts' determination of Rule 56(f) in a municipal liability context. Petitioner's argument has already been addressed by this Court and was rejected as an incorrect statement of applicable law. *Hunter v. Bryant*, 502 U.S. 224, 227-228 (1991).

CONCLUSION

None of the issues Petitioner presents is of such precedential value to warrant review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. This case does not present an issue of federal law that needs to be settled by this Court. The Fifth Circuit and the district court meticulously reviewed the facts and applied correct legal standards in reaching their conclusions. For the reasons stated herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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